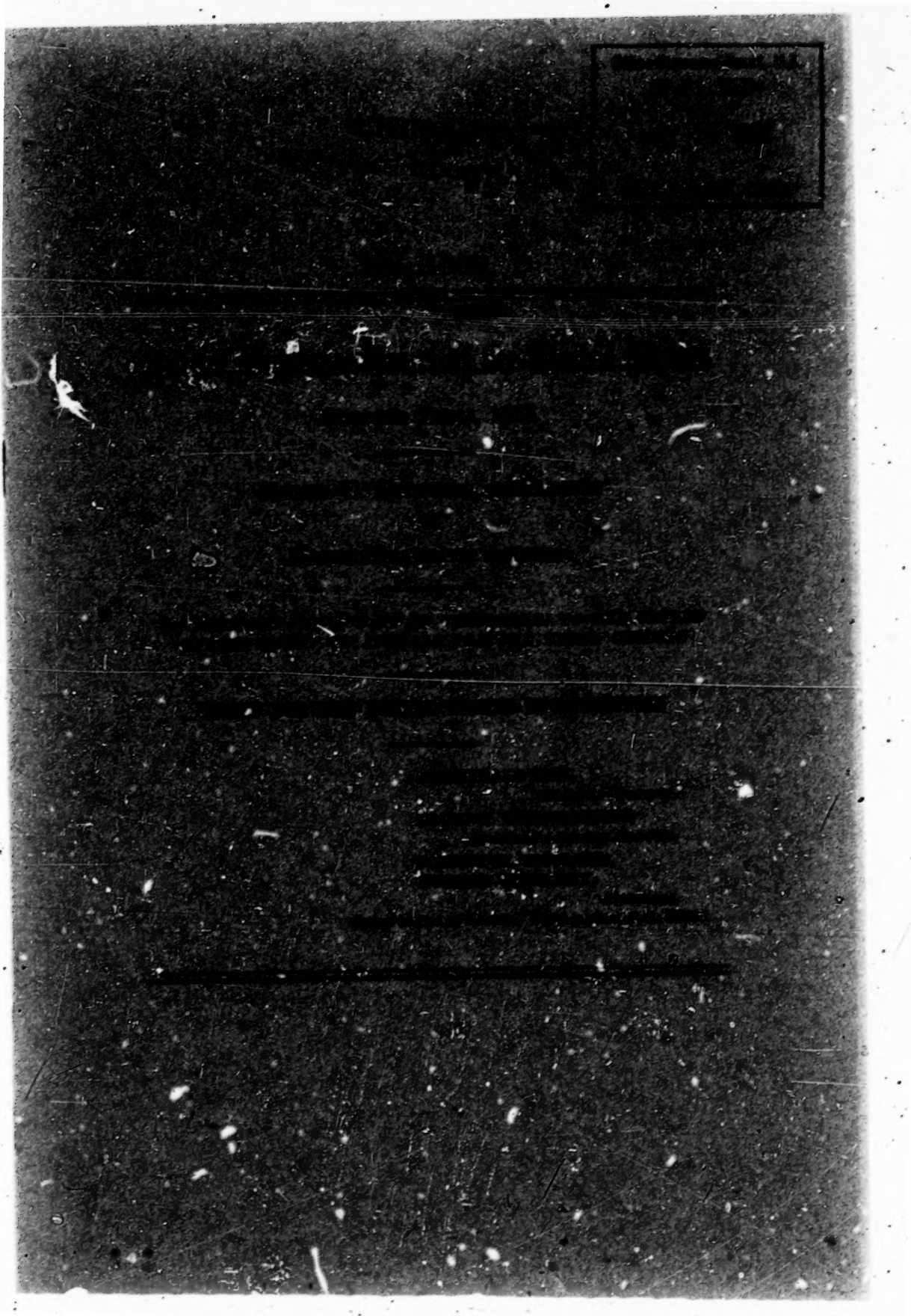

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731-352—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1008

MORRIS C. GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 1211a-1233a)[1] is reported at 206 F. Supp. 394. The opinion of the court of appeals (Pet. 1a-25a) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1964. (Pet. 26a.) The petition for a writ of certiorari was filed on April 15, 1964. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

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[1] "R." references are to appellant's appendix in the court of appeals.

QUESTIONS PRESENTED

1. Whether certain corporate records which had been removed without permission from the corporate files by employees of the corporation and given to the Internal Revenue Service could be introduced into evidence.

2. Whether the substitution of an alternate juror for a person who had mistakenly served as a regular juror was erroneous.

RULE INVOLVED

Federal Rules of Criminal Procedure:

Rule 24.

TRIAL JURORS

* * * * *

(c) *Alternate Jurors.* The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. * * *

STATEMENT

After a trial by jury, petitioner was convicted on six counts of a 51-count indictment in which he and

his administrative assistant, Rudolph Csiesek, were charged with violations involving the evasion of income taxes (Pet. 1a).[2] The counts on which petitioner was convicted charged him with attempting to evade and defeat his personal income taxes and the income taxes owed by several corporations under his control, in the years 1955 and 1956. Petitioner was sentenced to a total of seven years imprisonment, to be followed by five years of probation, and was fined a total of $70,000 (R. 5a, 1234a–1235a).

The government's evidence may be briefly summarized as follows:

In 1955 and 1956 petitioner was president of thirteen corporations, all of which were engaged in the laundry and linen supply business (R. 181a–184a). He owned or controlled most, but not all, of the stock of the four corporations named in Counts 4, 5, and

[2] In only the first 27 counts of the indictment was petitioner charged as a defendant. The district court granted petitioner's motion for a judgment of acquittal on Counts 6 and 10 through 27 (R. 3a), and granted a post-trial motion for arrest of judgment as to Count 1, which charged a conspiracy between petitioner and Csiesek (R. 5a, 1233a).

[3] The total unreported income and tax deficiencies alleged were:

Counts	Years	Taxpayers	Record pages	Unreported income	Unreported tax
2–3	1955 & 1956	Morris C. Goldberg	15a	$726,347.98	$635,962.11
4	1955	Pennsylvania Coat & Apron Supply Co. (New Jersey)	16a	141,397.79	72,932.72
5	1955	Pennsylvania Laundry Co.	16a–17a	87,939.04	45,728.30
7	1956	Pennsylvania Coat & Apron Supply Co. (Pennsylvania)	17a	183,456.65	95,397.15
8–9	1955 & 1956	Anderson's Empire Coat, Apron & Towel Supply, Inc.	18a–19a	210,528.14	109,508.90
		Totals		$1,354,340.00	$869,529.18

7–9 of the indictment during these years (R. 734a–738a). Csicsek was controller of petitioner's corporations (R. 214a). He pleaded nolo contendere to the counts in which he was charged and testified for the government at petitioner's trial (R. 2a).

In January 1955, petitioner directed Csicsek to rewrite certain corporate books so as to understate the cash sales of some of the corporations and to credit petitioner's Loans and Exchange Account in the amounts of these understatements (R. 216a–217a). At this time petitioner was indebted to certain of the corporations for approximately $387,000 by reason of personal loans (R. 792a–793a, 802a), but the understatements of income for 1955 and 1956 were greater than the opening loan balance. The jury could have found that petitioner thereby understated taxable income of the four corporations by more than $600,000, thus evading in excess of $300,000 in corporate income taxes (R. 954a–957a). The jury also could have found that petitioner understated his personal taxable income by more than $600,000 in the years 1955 and 1956, thereby evading in excess of $500,000 in income taxes (R. 957a–961a).

The records were rewritten first by Csicsek and then by one Daniel Ferrari, who, in 1955 and 1956, was accountant and internal auditor of these corporations (R. 216a–217a, 219a, 223a–224a, 414a–415a, 419a–422a). Petitioner told Csicsek the amounts to be understated each month, and Csicsek then communicated with Ferrari by means of cryptic coded messages (R. 219a, 430a–450a). In June 1956, after

Csiesek had temporarily left petitioner's employ, Ferrari's instructions were personally confirmed by petitioner (R. 421a–422a). Various witnesses also testified that funds which petitioner withdrew from the corporations were used by him for personal purposes (R. 468a–487a, 595a–619a, 647a–649a, 650a–654a, 661a–666a, 667a–668a, 682a–683a).

Petitioner had instructed Csiesek to destroy the original sales records after they had been rewritten, but Csiesek retained them in a filing cabinet in his office (R. 236a, 295a–302a). On leaving petitioner's employ in June 1958, he took these records home (R. 236a–237a). Csiesek also kept a summary of the amounts credited to petitioner's Loans and Exchange Account (R. 259a–273a) so as to be able to advise petitioner at any time on the current status of this account (R. 267a). All these records were surrendered to the government after Csiesek pleaded *nolo contendere* (R. 2a, 508a–509a, 536a), but neither Csiesek's attorney nor any government official knew that Csiesek had these or any other records prior to his plea (R. 322a, 504a, 531a–532a, 549a–550a).

The government had also been given corporate records by Ferrari and Raymond Dombkiewicz, one of petitioner's accountants (R. 368a, 406a, 423a). Neither had communicated with the Internal Revenue Service prior to the time they took these records (R. 370a–371a, 379a–380a, 426a, 427a). Some of these records were introduced into evidence, over petitioner's objection, at the trial (*e.g.*, R. 238a–239a, 382a, 430a).

On the ninth day of the twenty-three day trial, it was discovered that one of the jurors had inadvertently been incorrectly identified when the jury was selected, and that she had mistakenly taken a seat as a regular juror (R. 655a–657a). The court withdrew the juror from the panel and substituted the next alternate juror in her place (R. 657a–661a).

ARGUMENT

1. There is no merit to the contention (Pet. 12–17) that the court erred in admitting into evidence the corporate records given to the government by Csicsek, Ferrari and Dombkiewicz. Petitioner conceded at trial that no government agent had participated in the taking of these documents from the corporation's files (R. 555a), and government agents had no knowledge of the existence of these records until well after they came into the witnesses' possession. Consequently, this case is distinguishable from *Elkins v. United States*, 364 U.S. 206, in which this Court held that "unconstitutionally seized evidence" (364 U.S. at 215) could not be used in a federal criminal trial, albeit the evidence had been obtained by State officials. The witnesses' private conduct in the present case patently involved no violation of constitutional rights, so that exclusion of the evidence is not compelled by the holding or reasoning of *Elkins*. Nor would it serve any remedial purpose to impose an exclusionary rule on all evidence which may be tainted by illegality of some sort, irrespective whether the illegality is governmental or private. For when, as in this case, government agents have had nothing to do with the al-

leged illegality, there is no danger that the government might be accused of being "a lawbreaker" or of "commit[ting] crimes in order to secure the conviction of a private criminal * * * ." *Elkins* v. *United States*, 364 U.S. 206, 223, quoting from *Olmstead* v. *United States*, 277 U.S. 438, at 483 (Brandeis, J., dissenting). Hence the principle applied in *Burdeau* v. *McDowell*, 256 U.S. 465, 476—*i.e.*, that if documents "come into the possession of the Government without a violation of petitioner's rights by governmental authority, * * * [there is] no reason why the fact that individuals, unconnected with the Government may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense"—governs this case notwithstanding the intervening decision in *Elkins*.

Petitioner contends that *Burdeau* is distinguishable because the government in this case obtained the corporate records "by holding out the hope of financial reward and by making promises of leniency" (Pet. 15–16). At best, as the court of appeals observed (Pet. 8a–9a), this claim, if true, would affect the credibility of the witnesses; it would not require exclusion of the evidence. Moreover, the witnesses denied that they had been motivated by any promises or rewards (R. 427a, 567a), and, in fact, no government agent knew of Csicsek's documents until after he changed his plea (R. 322a, 504a, 531a, 549a–550a).

In addition, the instant records belonged to the various corporations and not to petitioner, so that he had no personal constitutional privilege with re-

spect to them. *Grant* v. *United States*, 227 U.S. 74; *United States* v. *Fago*, 319 F. 2d 791 (C.A. 2d), certiorari denied, 375 U.S. 906; *United States* v. *Guterma*, 272 F. 2d 344 (C.A. 2d). *Henzel* v. *United States*, 296 F. 2d 650 (C.A. 5th), and *Wild* v. *Brewer* (C.A. 9th), decided March 19, 1964 (64-1 U.S.T.C., par. 9348), relied on by petitioner (Pet. 17), are distinguishable. *Henzel* concerned a Fourth Amendment claim by a sole shareholder of a corporation against an illegal search of his office by a federal postal inspector, who seized certain corporate records. In *Wild* the court dealt with the sole shareholder of a corporation who invoked the Fifth Amendment in response to an Internal Revenue summons calling for the production of certain corporate records. The present case involves no unreasonable search, as did *Henzel*, nor was petitioner the sole shareholder of the corporations involved—although he did own controlling interests (R. 734a–738a). Unlike the corporation in *Wild*, therefore, the corporations in this case could not be said "to embody or represent the purely private or personal interests" of petitioner. *United States* v. *White*, 322 U.S. 694, 701. And the records involved in this case, which petitioner had instructed be destroyed but which he suffered to remain in Csicsek's file and in Ferrari's desk (R. 236a, 424a–425a), hardly qualified as "private records of the individual members or officers" of the corporation since they "embod[ied] no element of personal privacy * * *." 322 U.S. at 699–700.

2. The substitution of an alternate for the juror who erroneously served for nine days was eminently proper and was authorized by the governing Federal Rule of Criminal Procedure. Petitioner's contention that substitution was authorized only if the regular juror had "become unable or disqualified" subsequent to the jury's impanelment was fully answered by the court of appeals (Pet. 24a):

> Appellant appears to lose sight of the fact that the challenge of a juror for cause may be waived by the accused and the prosecutor. Here the appellant, after he learned of the real identity of Ida, could have consented to her serving on the jury. Instead he objected to her doing so by asking for a mistrial. *It was at this juncture that Ida became "unable or disqualified" to serve on the jury.* This could not have been known until appellant raised his objection. That Ida was subject to being withdrawn upon being challenged from the time she responded to the name of Lottie cannot obliterate that fact. * * * [Emphasis supplied.]

Moreover, petitioner was not prejudiced by the mistaken service of the regular juror for the first nine days of his trial. For had the error not been made initially, the very same twelve jurors who ultimately rendered the verdict would have been selected as regular jurors since the first alternate would then have been the twelfth juror.

CONCLUSION

The case was correctly decided by the court of appeals; no conflict exists among the circuits; and further review is unwarranted. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

MAY, 1964.

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